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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
*Petitioners,*

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR THE PETITIONERS.

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IN THE

# SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1957.

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**No. 714.**

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MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
*Petitioners,*

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## BRIEF FOR THE PETITIONERS.

### I.

Certiorari was granted March 10, 1958, to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause, Civil No. 15,740 in said Court.

## OPINION BELOW.

The majority and dissenting opinions both upon the original hearing and upon the petition for rehearing are reported in 248 F.2d 879, and were printed in the Appendix to the Petition, pp. A2 to A23 and are now pages 79 to 100 (Transcript of Record). The judgment of the trial court which was reversed appears in the Record, p. 70; opinion, D. C. 147 F.Supp. 547.

## JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under 28 United States Code, Sections 1254 (1) and 2101 (c), providing for review by this Court by certiorari of decisions of a Court of Appeals.

The date of the opinion sought to be reviewed was November 5, 1957. A petition for rehearing was filed in apt time, and was denied on December 6, 1957, and the judgment reversing the District Court became final on that date.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

(1) Procedural due process of law—"* * * nor be deprived of * * * property without due process of law." 5th Amendment to the U.S. Constitution.

(2) "In suits at common law, * * * the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." Amendment 7, U. S. Constitution.

(3) "The Judicial Power [of the United States] * * * shall extend * * * to controversies * * * between citizens of different states * * *" Article III, section 2, U. S. Constitution.

Iowa Code regulating life insurance companies in substance provides the company must attach to the policy "or of the contract of insurance" any application that "in any manner affects the validity." Iowa Code, Sec. 511.33.

Sec. 511.34, Iowa Code, provides in substance, neglect to comply with above section, the company "shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in an action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

For exact copy from Iowa Code, see Appendix, hereto, p. 48.

## QUESTIONS PRESENTED.

### I.

**Violation of the Erie Rule by the Court of Appeals.**

The Court of Appeals reversed a judgment upon a verdict for a plaintiff wherein the trial court followed the Iowa decisions by the court of last resort both as to *how, when* and *by whom* an insurance company can extricate itself from a printed contract of preliminary insurance made in the state of Iowa, including the Iowa doctrine of "mending his hold".

While the prevailing opinion on appeal purports to be finding what the Iowa law is, it does not follow latest Iowa decisions, but cites and quotes at length from *Mofrad* v. *New York Life*, (10th Circuit) 206 F.2d 491, a Utah contract, and the opinion seems to hold that because that is the Utah law it should be the Iowa law. The opinion is influenced by the quotation and citation from non-Iowa cases set out on pages A10 to A17 thereof, and shows on its face that the majority does not abide by the rule in *Erie Railway* v. *Tompkins*, 304 U.S. 64.

The trial court required a strict compliance with the exact words of the contract as drafted by the insurance company with regard to the "defeasance" clause in accord with the decisions of the Supreme Court of Iowa, which Iowa law is as follows:

> Although an insurance company, even after it learns of the death of insured, may exercise its power under the defeasance clause somewhat similar to that printed herein, when it had previously begun to process the application in its regular channels before knowledge of death, if it completed its customary investigation and determined in the usual course of passing on applications not to issue a permanent policy based upon a good faith finding by those in authority at the home office that he was not insurable because of bad health.
>
> *Reynolds* v. *Northwestern Mutual Life*, 189 Iowa 76, 176 N.W. 207.

> But this power to avoid a contract under the express defeasance clause is terminated by the company giving some other excuse for not performing ("Mending his hold") and power can only be exercised by those authorized by their by-laws, and in the due course of company procedure.
>
> *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 315, 103 N. W. 207.

There was no pleading and no evidence of any attempt of defendant to exercise its power under the defeasance clause, and thus to avoid the contract, within the time and in the manner required by the Iowa decisions.

The Court of Appeals disregarded these decisions of the Supreme Court of Iowa and the holding of the Trial court and Iowa Code, § 511.34, and held on page 18 (R. p. 96) of their opinion that defendant had "made a determination" that Hinkle was not insurable, disregarding the time and manner required. Also defendant never claimed either in its evidence, its pleading, or errors argued, that it ever attempted to make such a determination, and the only evidence was that defendant's General Agent for Iowa tried to "bluff out" the widow into believing that there was no contract of insurance. Their vice president testified they had no record that they had ever received the application (Record p. 47). It also disregarded the spirit of Iowa decisions that defeasance clauses must be strictly followed to avoid forfeitures, if possible, as in *Temple* v. *Fraternal Bankers Reserve Ins.*, 179 Iowa 65, 161 N.W. 102. The clause was not strictly followed, or even put in issue at all and defendant did not claim that it had made a determination in its usual course of procedure and determined not to issue a permanent policy, merely that the application contained false statements. (We point out later that there were no misrepresentations, that the agent kept the only copy of the application signed before the blank spaces were filled in, and filled in false answers after he learned of the death.)

The doctrine, "mending his hold", represented by *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 315, 103 N.W. 207, precluded defendant from asserting any of the defenses it pleaded, except the one it first asserted after Hinkle's death as its excuse or reason for its refusal to perform its con-

tract, and the Court of Appeals reversed on a ground other than defendant first asserted, and thus did not follow the Iowa decisions on "mending his hold".

The Court of Appeals also refused to use the Iowa decisions on the general law of estoppel. The dissenting opinion is an estoppel doctrine.

The Court of Appeals also re-wrote the second "proviso" of the contract relating to "rating applied for", to make it read "amount of premium charged".

Thus, even if the facts were as found by the opinion, they still violate the Erie rule, and it reversed the Trial court because he did not violate such rule.

**B. The Court on its own motion passed on a point of Iowa law not assigned as an error, and did not follow any Iowa decisions therein,** as follows:

At the time of delivering the printed contract the insurance agent wrote therein in ink the words "immediate coverage". The evidence of defendant also showed that there was printed upon the application, words to the effect that the premium was charged from the date of the application, not the date of the policy, and the vice president testified that if they had issued a policy to Hinkle the due date of the annual premiums would have been the date of the application, not the date of the policy (Record p. 49). The only error assigned or argued with regard to this writing, was that the agent had no authority to write it there, and that the entire receipt was merely an offer, and did not become a contract until accepted by issuing a policy. The written briefs of both parties concerning this writing were confined to the Iowa decisions as to the agent's authority under such circumstances. It was conceded by both parties that if this "receipt" was a contract at all, the

question on appeal was whether under the Iowa decisions the agent had authority. The appellate court refused to use the Iowa cases cited by the parties because it held the words "immediate coverage" did not supersede the conditions that were printed, and thus it was unnecessary to pass upon the authority of the agent. If the court had read the Iowa cases cited in appellee's brief, it would have found that the Iowa Supreme Court considered that under the circumstances of charging a premium during the interval, such a promise does supersede the printed conditions, otherwise the Iowa court would not have taken the trouble to hold that the agent did have "apparent authority" in spite of an express restriction in his agency contract to the contrary—that on that point Iowa follows an estoppel doctrine. The Iowa cases cited and ignored by the opinion are *Nertney* v. *National Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826; *Boever* v. *Great American Ins. Co.*, 221 Iowa 566, 266 N.W. 276; *McDonald* v. *Equitable Life Ass. Soc.*, 185 Iowa 1008, 169 N.W. 352, and they show that the Iowa law is opposite to that held by the majority opinion. Could be that Iowa law implies one has insurance if he is charged for it.

The recital of what the Iowa law is without citing any authority, and a refusal to pass upon the Iowa decisions, violates the Erie rule, and also is not procedural due process.

**C. To reverse an Iowa trial judge based on "weight of authority" violates the Erie rule.**

On page 16 (R. p. 92) the opinion says the trial court erred because he took the position in a colloquy that good health and insurability are synonymous, and thus erred, and then the opinion discusses the split of authority on that point and decides it according to the "weight of authority", without any Iowa cases. We think the Court misunderstood

the Record, and that the trial court held just the opposite of what the opinion understands, but if the trial court did so hold, the opinion violates the Erie rule, for there are no Iowa cases on that point at all, none were cited and none can be found. In a diversity case the Federal trial court is an Iowa forum, and if he held what they say he held, they violate the Erie rule when they say he erred, in the absence of a decision of a higher Iowa court.

II.

**The Majority Opinion in This Eighth Circuit Is in Conflict with Opinions on the Same Subject in the Sixth Circuit, Liberty National Life Ins. Co., Inc., v. Hamilton, 237 F. 2d 235 (October, 1956), and with Opinions in the Second Circuit, Gaunt v. John Hancock Mutual Life Ins. Co., 160 F. 2d 599.**

The Tennessee decisions involved in the Sixth as to the insurance contract were more favorable to the insurance company than is the Iowa law; but the decisions of Iowa on the general principles of estoppel are the same as Tennessee. *Miller* v. *Lawlor*, 245 Iowa 1144, 66 N. W. 2d 267. Yet, where a Tennessee contract said in one sentence that no insurance was in force until the policy was issued, and said in another sentence words which one might take to mean that it was in force immediately, the Sixth Circuit applied the law of estoppel, and held that the company could not defeat that contract after insured died and it was too late for him to get other insurance. Yet, here the Eighth Circuit, a contract has written in ink "immediate coverage", and it contains no notice like the Tennessee one that a policy must be issued, and where one has every right to believe that if he is being charged premium during the interval of investigation, that he has the insurance that he is paying for—a much stronger case of estoppel than

the Sixth Circuit, yet this Eighth Circuit ignores the Iowa law of estoppel, and relies on a case of a Utah contract that was so different that the case was not even in point.

The practical situation that exists throughout the whole United States that can be corrected only by certiorari herein is:

> "There is no way of getting any recent decisions on these insurance contracts on the applicable state law because insurance companies are removing the trials to the Federal courts, who can only 'bathe the litigants in stale water' unless they can apply modern decisions on estoppel."

And then in the circuits we have conflicting decisions, as illustrated at bar, as follows:

"1. If plaintiff had sued in the Sixth Circuit she would have gotten a directed verdict in her favor on the appeal on the law of estoppel of the state involved.

2. But when she sued and the case could be removed to a court in the Eighth Circuit, she gets a verdict in her favor at the trial, and a directed verdict against her on appeal, plus a holding that the disputed evidence of defendant is conclusively true, and is thus deprived of a jury trial, as guaranteed under the 7th Amendment.

3. But if the case had remained in the Iowa courts she would have a directed verdict in her favor at the trial, no parol evidence would have been admitted to vary the delivered contract, Code, §511.34, would have been followed, and it would have been affirmed by the Iowa Supreme Court.

4. If the case had been in the Second Circuit plaintiff would have a directed verdict against her at the trial, but a reversal on appeal on the ground of strict compliance by the company with its own

words, 'upon the understanding created, not nicety of words' used."

Certiorari in this case is necessary to protect beneficiaries of such contracts, who are usually widows and orphans, who cannot afford the printing expense of long briefs and citations from everywhere as to the "weight of authority", when if we can get a uniform decision of the circuits, the insurance companies will not burden the Federal courts with removal, and the briefs will be short and to the point on state decisions, and there will not be the hazard as to the forum, and the correct ruling for all the circuits is, that the law of estoppel is alike everywhere, and that when an insurance company allows a man to go to his death believing his wife and children are provided for, that they are thereafter estopped to claim otherwise, and more especially so, when they have charged him a premium over the interim so that if he lives and gets a policy he has to pay premium for the interim after it is conclusive that he did not need insurance during that period, but if it is determined during that period that he *did need* it, then the insurance company can prove he does not have it. Mere sense of equity dictates that the universal law of estoppel should apply after he is dead. Plaintiff plead estoppel here.

Federal courts should have a uniform holding that when an insurance company has set up a situation whereby it has the power to charge a man for interim insurance if he lives and gets a policy, but if he dies he does not have insurance, *i. e.*, if he does not need insurance he has to pay for it, but if he needs it he does not have it, is inequitable, and the courts will not assist in such a game as "heads I win, tails you lose". A practical situation, as illustrated herein: Usually the dealing is between the insurance agent and a man at the trial deceased. Such puts it in the power

of the agent to testify to any thing he chooses, and no one alive can contradict him. In this case it so happened that two witnesses did contradict him on all the details of what occurred in Hinkle's office.

At least the Federal courts should have a uniform rule, that when the other party to a transaction is dead, the testimony of the insurance agents is not conclusively true even if it is not contradicted; and where as here, it was contradicted, the Federal courts should not do as the majority opinion did herein and hold the agent's testimony is conclusively true. Also, even if there were no statute like Iowa Code, Sec. 511.34, the fact the agent did not give insured a copy of his application opens the door to fraud too much, gives every insurance company absolute power to falsify applications, and thus to defeat a man whose lips have been sealed in death. The Federal rule should be that the failure of the insurance agent to deliver insured a copy of his application shows such a lack of good faith, as to make that agent's testimony, not conclusively true, as held herein, but always a jury question even when it is not contradicted by the circumstances.

## III.

### Court of Appeals Violated Plaintiff's Rights under 5th and 7th Amendments.

Compared with the record of the issues, grounds stated in the motion for directed verdict, and errors assigned and argued on appeal, the opinion in ordering a directed verdict for defendant, is a violation of plaintiff's right under the 5th Amendment to the U. S. Constitution to due process of law. It is not due process to try a law action *de novo* on appeal, and to hold the defendant's evidence conclusively showed something defendant never claimed in pleading,

evidence, or errors argued, denies a jury trial, and is not the "rules of the common law."

Also, when the trial court admitted evidence over plaintiff's objection in violation of the parol evidence rule, and of Iowa Code, Sec. 511.34, under a ruling that he would take care of it in his instructions, that part of the opinion that holds such evidence was conclusively true and orders a directed verdict for defendant thereon, violates plaintiff's rights to due process of law under the aforesaid amendment.

It was not due process for the Court of Appeals to re-write the clause that used the term "rating applied for" and substitute for such the term "amount of premium charged by the company", or to construe the words used to mean the latter, in the absence of any evidence that "rating applied for" means the latter. It is not due process to substitute the legal knowledge of an insurance attorney, for the understanding of an ordinary person, even assuming the understanding of the attorney is correct. And if there had been evidence introduced to that effect, it still is not due process to hold such evidence conclusively true when both parties have demanded a jury trial.

The Court of Appeals denied plaintiff a jury trial as guaranteed to her by the 7th Amendment to the U. S. Constitution, by holding that evidence offered by defendant of a transaction with a man deceased at the time of the trial was conclusively true, and more especially so when defendant's witness was contradicted on all his details by two other witnesses, and when the physical appearance of defendant's exhibits contradicted defendant's witness, and where the facts testified to were contrary to human nature.

IV.

**A Removal by a Corporation Does Not Fall Within the Judicial Power of the United States, and the Trial Court Erred in Overruling Plaintiff's Motion to Remand, As a Corporation Is Not a Citizen of Any State, and the Case Is Not "Between Citizens of Different States".**

The platitude followed since 1844 has no basis in law when applied to *Removals*. Letson case does not permit *Removals*.

## STATEMENT OF THE CASE.

On February 25, 1955, defendant executed and delivered to Max Hinkle in Iowa a contract of life insurance, as follows:

CONDITIONAL RECEIPT DO NOT DESTROY.

Received Twenty One and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts,
for Insurance of $10,500 on the life of W. Max Hinkle
Immediate Coverage

The Insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of

this premium is not paid on presentation, this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25 1955

Philip C. Raye
Secretary

Rodney Bliss, Jr., General Agent

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded.

At that time Hinkle signed an application form prepared by defendant, primarily in blank at the request of defendant's agent, who intended to fill out the blank spaces later. No copy of the application was delivered to Hinkle. The delivered contract was detached from the form, and was delivered as a complete contract in itself. At that time the "General Agent" of defendant wrote on the delivered contract in ink the words "immediate coverage," before delivering it. At the trial defendant produced the application and offered it in evidence over the objection of plaintiff that it violated the parol evidence rule and defendant was prohibited by Iowa Code, Sec. 511.34, from making any use of it because no copy of it was delivered to insured. The court ruled that he would take care of it on the instructions (Record p. 32). There was dispute in the evidence thereafter as to whether the agent wrote false answers concerning Hinkle's pilot's license into the application after Hinkle died, or whether Hinkle told him false answers to the questions concerning being a pilot. A view of this application is important for plaintiff claims that it shows on its face that those false answers were written under different conditions than the other writing

appears. It was not disputed that all handwriting on the application was that of Agent Bliss, except Hinkle's signature. Two witnesses who saw Bliss writing said Hinkle's desk was so crowded that Bliss wrote on a pull out board. Bliss denied this. We mention this dispute in testimony because the appellate court held the trial judge erred in not directing a verdict for defendant on all this disputed testimony. The jury could well have found that those false answers were put on that application after the agent learned of Hinkle's death. At the time defendant put this application in evidence it was still blank as to the essential information, such as "amount, plan, and rating applied for."

The above is important because the Court of Appeals (R. p. 91) based its opinion of reversal on the defeasance clause of the contract, which read as follows:

> "*but if the Company determines* that the Proposed Insured is not insurable,* (for the amount, plan, and rating applied for) said application shall be declined and the amount paid will be refunded upon return of this receipt".
>
> *(This part is taken by reference from the clause above it.)

and held the evidence conclusively showed Hinkle was not insurable for the 'amount, plan, and rating applied for", in the face of the application being absolutely blank as every one of these three things, and in spite of the fact the vice president of defendant testified that Hinkle was insurable for every plan they had, and for any amount they had (R. p. 48). The first clause of the receipt said: "The insurance applied for shall be in full force from this date, provided, he is in good health", etc.

Going back now to the time of delivery of the "receipt", defendant's agent called its examining physician on

Hinkle's phone, and the examination was set for the following Monday at 11:45 a.m. There is conflict in the evidence as to why this was. Mrs. Hanson, a stenographer who heard the conversation, testified that Bliss told Hinkle the doctor had said over the phone that he could not examine him until Monday, whereas Bliss testified Hinkle was the one who requested that the examination be set for Monday. Both courts held that the fact that it was set for Monday was the important thing, and it was not material who requested it, as by agreeing to it such condition was waived until Monday, and after that it was excused because of impossibility. And the Court of Appeals held, that the "receipt", "can not fairly be construed to add the medical examination as an additional condition precedent." (R. p. 91). We mention this because after so holding, to direct a verdict on any other ground than that first elected by defendant violated the Iowa rule on "mending his hold", for defendant in its answer, paragraph 10 of its "second defense" pleaded that its agent notified attorney for Mrs. Hinkle that there was no insurance in force because Hinkle had not taken a physical examination (R. p. 9), and Mrs. Hinkle testified that the same agent told her that they would not pay because Hinkle had not taken a physical (R. p. 29). And thus under the Iowa decisions defendant was limited to that one defense.

This contract was made and dated on Friday, February 25, 1955. Hinkle was killed the next day.

It was the custom of Mr. Hinkle to fly his own airplane to Omaha, Nebraska, on Saturday mornings to give instruction in flying to the Iowa-Nebraska Air National Guard, of which he was an officer.

On Saturday, February 26, he got up before his wife did, got his own breakfast and left for the airport. When

Mrs. Hinkle went to the kitchen for her breakfast she found this contract in suit on the kitchen table where her husband had put it as he left for the airport. This fact is important for it shows defendant led Hinkle, until after it was too late, to believe he had protected his wife and children with insurance. It supports plaintiff's express pleading of estoppel. About 8 o'clock Saturday morning after Mrs. Hinkle had found this "receipt" on the kitchen table, her neighbors came with the news that her husband had been killed.

About two weeks after Hinkle's death, the General Agent of defendant called Mrs. Hinkle and denied liability on the contract, on the ground that Hinkle had not had a physical examination. At no time since Hinkle died did defendant take any steps to exercise their power under the defeasance clause to avoid their contract.

After denying liability for an invalid reason (R. p. 29; R. p. 9), defendant's agent did write Mrs. Hinkle a letter on May 19, 1955, almost 4 months after Hinkle died, in which he enclosed the check, but the letter gave no reason for same in addition to what he had already told her on the phone (Def. Ex. G., R. p. 41). The defeasance clause required them to determine in their customary manner whether to issue a policy, then to return the premium on the ground that they had so determined, and to get the receipt back. They did none of these three requirements. We mention this because the appellate court held on page 16 (R. p. 96) of the opinion that "defendant made a determination that Hinkle was not so insurable". The fact was, defendant claimed the agent had never sent the application to the home office. All they ever did was to bluff the widow into a belief there was no contract. They never made a determination as required by the two Iowa de-

cisions we cite, at the home office by the proper committee, and in the usual course of time for such determination.

Plaintiff's pleading was in the alternative, either as administratrix, or as beneficiary, and pleaded the contract as unconditional because of the words in ink, "immediate coverage", and if such did not supersede the conditions, then sought recovery on it as a conditional contract. In its answer defendant failed to put performance of the condition of good health, in issue in that it did not comply with Federal Rule 9(c), which requires "A denial of performance or occurrence shall be made specifically and with particularity". Instead of complying with that rule defendant pleaded that it did not have knowledge as to his good health. However, the trial court submitted the question of health to the jury under an instruction that there was sufficient evidence of good health, that the jury should consider the circumstances, the presumptions, and the medical examination when his pilot's license was renewed, which was in evidence. No objections were taken by the defendant to any of the court's instructions to the jury. No motion for directed verdict was made by defendant at the close of plaintiff's evidence. At the close of all the evidence defendant made its first and only motion for directed verdict, on the grounds stated therein. It did not contain any ground concerning good health, and did not contain any ground to the effect that they had performed the defeasance clause. Their basic theory was that it was only an unaccepted offer, and they did not have to avoid it.

The answer of defendant pleaded as defenses: 1. that no contract ever existed because it was an offer that had never been accepted; 2. that they had never received the report of the medical examiner mentioned in the second proviso (Both courts held against them on this as it was

the fault of this agent (R. p. 92) and was not a condition (R. p. 91)); 3. that the agent had no authority to write on the receipt "immediate coverage"; 4. that defendant violated an Iowa statute by dating the contract prior to a physical; 5. that Hinkle misrepresented his pilot's license, etc., and was thus not insurable—no allegation that they had determined such fact in the time, manner and by whom, as required in the Iowa decisions, *supra*. As to the defenses, that he was not insurable "for the amount plan and rating applied for", the application was blank as to those three facts. The trial court held defendant had not established any of its defenses and that if Hinkle was in good health on the date of the application plaintiff was entitled to recover, and submitted that fact to the jury. No objection was taken to this and no error assigned on it. See Iowa decisions on, "mending his hold" *ante*.

To comply with Iowa procedure plaintiff pleaded facts which worked an estoppel on defendant as to defenses pleaded by defendant. This pleading is printed in Record pp. 24-28.

We mention this fact because the Iowa decisions concerning the apparent authority of the agent to waive conditions and promise immediate coverage, are based upon the fact they are charging premium over this interim, and the reasons stated in those opinions show that it is on the ground of estoppel; and what the Iowa decisions on "apparent authority" actually hold is that when the insurance company has the power to charge a premium for the interim, it is estopped from claiming there was no insurance during that period.

Defendant's evidence, including the application, shows conclusively that defendant would have dated the policy the

date of the application (R. p. 49), and had printed on the application (Def. Ex. D, R. 36, 40, 20) that the due date of the premium was the date of the "receipt", not the policy, that is, they charged premium over the interim.

The trial court got both parties to agree that Mrs. Hinkle should recover as beneficiary, rather than as administratrix, to simplify the instructions. The trial court overruled defendant's motion for directed verdict, and submitted the case to the jury under instructions. Defendant did not object to any of the instructions. The jury returned a verdict for plaintiff, and the court entered judgment thereon, which judgment is printed on Record p. 70. Thereafter defendant made Motion for Judgment Notwithstanding Verdict, on the ground of lack of sufficient evidence of good health of Hinkle. The court overruled this motion. There is no such motion in the Federal Rules, and if there were it lies to defects in pleading, not to defects in evidence, and is not "according to the rules of the common law". See 7th Amendment.

Thereafter defendant appealed and argued specified grounds of error as to why his motion for directed verdict should have been sustained, none of which was that it had performed the defeasance clause. The Court of Appeals ordered a verdict directed for defendant on a ground not raised or argued, to wit "that defendant made a good faith determination that he was not so insurable." (R. p. 96). The dissenting opinion thought defendant was estopped under Iowa decisions to set up each and all defenses it claimed. The majority ignored the Iowa decisions. Plaintiff petition for rehearing, mentioning the above Iowa decisions, and other omissions, and asserted the opinion violated her rights under the 5th and 7th Amendments, and called attention to the fact plaintiff had pleaded and proved

an estoppel under the Iowa decisions on estoppel on defenses claimed by defendant. Such petition was immediately denied.

## BASIS OF FEDERAL JURISDICTION.

Plaintiff filed her petition in the Iowa state court of original jurisdiction. Defendant in due time removed the case from the state court to the Federal District Court, stating that plaintiff was a citizen of Iowa, and defendant was incorporated in Massachusetts. Plaintiff filed Motion to Remand, in which she pleaded that defendant was not a citizen of Massachusetts, or any state, and that 11,000 shareholders of defendant were citizens of Iowa, the same state as plaintiff, and offered the certificate of the Insurance Commissioner of Iowa to prove it. The court ordered briefs filed on the subject. The court eventually overruled the Motion to Remand, and the ruling is in Appendix, p. A1 (See R. p. 79). Defendant is estopped from claiming there is no Federal jurisdiction. Plaintiff does not want to claim it if the Court will reinstate the judgment of the District Court.

When, and if, this Court holds that the judgment of the District Court should be affirmed on the merits, but at the same time holds that there was no removal jurisdiction, a question of Federal law then arises as follows:

(1) When a defendant removes a state case to a Federal court, and thereafter resists a motion to remand it, the Federal common law, incident to the conduct of the Federal court system, imposes upon defendant a quasi-contractual liability, or an implied promise, to perform any judgment rendered against defendant, should it later be determined after judgment that defendant had taken it to a court that had no jurisdiction.

CASE OF FIRST IMPRESSION.

(2) The common law of Iowa is as above stated, when the removal occurs in Iowa, and if there should be no Federal common law incident to the conduct of its courts, this court would not violate the Erie rule if it found the Iowa law to be as above, as a case of first impression in Iowa.

## SUMMARY OF ARGUMENT.

I. **Violation of Erie Rule by Court of Appeals.** The trial court got the result that an Iowa court would have reached, and it was impossible, under Iowa decisions, to prove he erred in overruling defendant's Motion for Directed Verdict. The majority opinion on appeal states the holding in one Iowa decision (R. p. 91) *Reynolds*. but instead of applying the facts as shown by the Record, in the light of other Iowa decisions to the rule as stated therein as to the "defeasance clause", the majority was so influenced by cases from other jurisdictions and tried to get a result reached in those jurisdictions. Some cases it cited were from states that held such "receipts" were merely unaccepted offers. It eventually held that the evidence conclusively showed that defendant had exercised its power under the defeasance clause, in the face of the record that showed defendant never claimed that it had. but claimed that no contract existed until defendant had rejected it and that it had never so rejected it.

The majority opinion ignored Iowa decisions that such was a contract until a policy was rejected; (1) after a determination by defendant that applicant was uninsurable, (2) and such passing on insurability had to be done in the regular course of passing on policies, at the home office, (3) and before some other excuse was given for nonperformance, *i.e.*, "mending his hold" doctrine of Iowa.

Majority opinion also ignored Iowa decisions on estoppel, and did not apply such doctrine to defendant having led Hinkle into belief he was insured for the interim, by its conduct, words used, arrangement of clauses, expressly writing in ink, "immediate coverage", and act of charging premium over the interim. Also ignored Iowa decisions that contract must be construed strictly against insurance company that drafts it, and ignored Iowa decisions of intendments against forfeiture, and construed the language strictly in favor of insurance company, and assumed without evidence, and held evidence of defendant, conflicting with human nature, conclusively showed that contract meant what defendant claimed it meant, which only an insurance underwriter would understand it meant, instead of construing a contract between two parties as to what one unexperienced in insurance terms would be led by the experienced one to think it meant, and rewrote the contract for benefit of insurance company.

B. Ignored Iowa decisions cited by appellee relating to authority of agent to promise immediate coverage, and, when the only ground for directed verdict claimed relating to the written words "immediate coverage" was lack of authority of the agent, held such words did not change the printed contract, where the decisions from Iowa indicate there is an imposed liability (unconditional) when premium is charged over the interim. From language used in these Iowa decisions, it is impossible for any outside court to say the trial judge did not follow the Iowa cases. Compare them with his ruling in 147 F. Supp. 547.

C. Majority held trial judge erred as to whether insurabilty and good health are the same, admitted there was a slit of authority, but determined he held against the "weight of authority", and such violates the Erie rule, he sat as an Iowa court, and there are no Iowa decisions of any higher court on that point of law.

II. **The Majority Opinion Conflicts with Opinion on Same Subject in Sixth Circuit, and in Second Circuit,** in that the Sixth applied the doctrine of estoppel of the applicable state law, and interpreted the contract the way insurance company led insured to believe it meant, and held could not exercise defeasance clause after insured died—same as advocated by the dissenting opinion herein; and Second Circuit held somewhat the same, and that insurance contracts are to be construed to mean what a layman would construe them to mean, not what they would mean only to an insurance underwriter.

III. **Violates 5th and 7th Amendments.** By holding evidence conclusively showed defendant had exercised its powers under the defeasance clause when there was no such evidence, and by taking judicial notice that words used in the contract conclusively meant what some lawyers might imagine an insurance underwriter thinks such words mean, or by assuming there was evidence of what they meant, and defining them differently than the dictionary, the court deprived plaintiff of her judgment without due process, and also denied her a jury trial on such issues. Also it is not due process to reverse a judgment in a law action on an error not raised in the court below, or not assigned as an error on appeal. Compare what majority did with *Reid* v. *Maryland Casualty Co.*, 63 F. 2d 10, Fifth Circuit.

IV. **No Federal Jurisdiction Because** cases relied on by defendant to sustain Federal jurisdiction, do not apply to *removals* by corporations, but are cases preventing corporations from defeating the right of a citizen to elect to use the Federal courts, and just the opposite would apply to the situation at bar, and they were decided before the 14th Amendment expressly defined who were "citizens * * * of the States wherein they reside".

B. A question of Federal law arises for the first time if this Court holds for petitioners that the judgment of the trial court should be affirmed, and also holds that there was no removal jurisdictions, and it will then be a case of first impression as to what the Federal common law is.

## ARGUMENT.

The only defense seriously urged by defendant was that no contract ever existed because the "receipt" was an offer, and could only be accepted by the committee headed by Second Vice President Arnold; that such committee had never passed upon it (See R. pp. 46, 47). They used this witness, Arnold, to prove that the authorized committee had never passed upon Hinkle's insurability. Two weeks after Hinkle's death Bliss, General Agent for Iowa, called the beneficiary and told her they would not pay because Hinkle had not had a physical examination (R. p. 29). For four months, and until May 19, 1955, Bliss kept bluffing her into a belief there was no contract of insurance, and on such date mailed the premium check to her, stating no reason. If we believe defendant's witnesses, the agent never sent the application to the home office, but relied upon his skill in bluffing this little woman into believing there was no contract.

The insuring clause of the "receipt" was, "the insurance applied for shall be in effect from this date" provided he is in good health; and the defeasance clause was, "but *if the company determines* that the proposed insured is not so insurable, said application shall be declined", etc. There was an intervening condition between the insuring and defeasance clauses "provided" the report of the medical examiner is received in the home office, etc. Both courts held the medical examination showing matters which we

discuss later was excused because defendant had prevented it from occurring by setting the medical examination for Monday (R. p. 92) and the Court of Appeals held the medical examination was not a condition precedent (R. p. 91).

The gist of the case is, what does it take under the Iowa decisions for defendant to perform this defeasance clause and thus work a forfeiture of this contract? The trial court thought that under the Iowa decisions, and the evidence of Vice President Arnold, that the "determination" as to whether Hinkle was insurable, etc., had to be performed in the home office in Boston by the proper committee, and that under the Iowa rule of "mending his hold" the company had to do this before they had assigned some other excuse for not performing their contract. Such is the Iowa law as announced by decisions of the highest court of Iowa. *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N. W. 207, and approved recently in *Craddock* v. *Life Assn.*, 225 Iowa 744, 285 N. W. 169. The appellate court reversed on this ground, and reached its conclusion as to what the Iowa law was by lengthy quotations from cases decided from almost everywhere, Missouri, Utah, Tenth Circuit, New York, and many others, which appear on pages 10, 11, 14, 15 (R. 88 to 94) of the majority opinion. They did mention the Reynolds case from Iowa, and then failed to follow it. They ignored completely the other Iowa decisions, and when reminded on Rehearing, refused to let it be decided by the full bench. They quoted from appellant's brief, which was 61 pages of citations and quotations, from decisions other than Iowa, trying to prove what the "weight of authority" was. The correct Iowa law was quoted in Appellee's Brief, page 23, from the Reynolds case as follows:

> "but if the company, IN THE PROPER EXERCISE of its legal rights under the law and contract which it is unnecessary for us to define in this opinion, REJECTS THE APPLICATION, *upon the ground that the applicant is not insurable*, and returns the premium paid, no liability can arise thereunder."

The reason it was unnecessary for the court to define what the proper method of passing on insurability in the Reynolds case was, that in that case there was no dispute but that the proper committee in the home office had followed the company's usual procedure in the proper course of time and in its regular order, and had determined that that applicant was not insurable, but before they had made their final decision they learned of applicant's death from heart disease, which they had already determined from independent rating agencies he had. There was no question there but that they had followed their usual procedure of passing on applications. There was no pleading or other claim of estoppel in that case, and the court did not pass upon any law of estoppel. The Iowa court merely held that the company could continue and complete their usual procedure they had started before his death, and make the final determination even after his death. But the Eighth Circuit holds herein, that because of the other non-Iowa cases cited and quoted from by the majority opinion, this defendant did not have to follow the procedure called for in the Reynolds opinion. And it also refused to follow the additional Iowa decision of *Farmers Milling Co.* v. *Ins. Co., supra,* which holds that an insurance company cannot avoid a contract by performing the terms of the defeasance clause after it has previously given some other excuse for not performing it, *i. e.*, the Iowa doctrine of "mending his hold". This *Farmers'* case, *supra*, further holds that the secretary of the company is not the proper one to perform the defeasance clause, but it must be passed

upon in the usual course by the board of directors, or whatever functionary is provided by the by-laws, which in the case at bar would be the committee at the home office that passes on applications, as testified to by the vice president on page 47 of the Record.

Another reason pleaded by defendant that there was no contract was, defendant claimed it violated an Iowa statute for the regulation of insurance companies that said in effect that no insurance company should issue a policy for over $10,000 that did not contemplate a physical examination. The trial court ignored this defense for three reasons: (1) the statute did not make the contract void, (2) this contract was not a violation of the statute, and if it were, (3) defendant could not claim the benefit of its own wrong. The appellate court thought it was unnecessary to pass upon this statute because they were reversing anyway, but in so doing indicated it would not follow the Iowa decisions on estoppel. Plaintiff had pleaded at length the facts of estoppel on this point and had argued fully that by printing these contracts for use in Iowa defendant either interpreted the statute to permit what defendant was doing, or had willfully violated it, that they had misled Hinkle, and could not claim the benefit of defendant's own wrong, which the majority impliedly indicates it will do. We cannot afford this certiorari, to say nothing of a second one.

On page 18 (R. p. 96), the majority opinion says, "There was no time for investigation prior to the applicant's death." Defendant knew when it printed these contract forms such might be the case of any applicant. Insurance companies dictate their own contracts, and under Iowa decisions they must follow them the way they print them, and follow them strictly. By the part of the opinion quoted above, the majority refused to follow other Iowa decisions

to the effect that such contracts are to be followed strictly the way the insurance companies draft them, and that every intendment is against a forfeiture, as represented by *Temple* v. *Fraternal Bankers Reserve*, 179 Iowa 65, 161 N. W. 102. However that may be, there was plenty of time after Hinkle's death before they assigned some other reason, to perform strictly the defeasance clause, if the Reynolds case is liberally construed. If instead of bluffing the little woman with some other excuse the company had taken the position that this "receipt" was a contract, instead of claiming it was only an unaccepted offer, and had proceeded to comply literally with the defeasance clause, it might have avoided the contract under the rule in the Reynolds case. But surely one is not avoiding a contract when he puts in his time insisting that it is merely an offer. The defendant's Answer is incompatible with the above expression of the majority opinion.

While it is true under the present rules of civil procedure, both Iowa and Federal, a defendant may plead inconsistent defenses, it seems not due process of law for an appellate court to hold "evidence conclusively shows * * * defendant made a good faith determination that he was not insurable" (R. p. 96), when defendant failed to plead or prove that he made such determination when he was permitted to so plead, and when his pleading and proof was directed to the point that no such determination was required because no contract had ever come into existence (see R. p. 47, 6th line from top).

I.

**The Majority Opinion Violates the Erie Rule in the Following Respects:**

Under Iowa decisions on the general principle of estoppel, defendant was *not* entitled to a directed verdict

*on any ground* mentioned in its motion, or on any ground the majority opinion discussed, as long as it was possible for a jury to find from the conduct of defendant, their act of charging and collecting the premium over the interim, or the words defendant printed or wrote on the "receipt", that defendant had caused Hinkle to believe to the time of his death that he had interim insurance.

> (1) Where one by his conduct has led another to rely on the existence of any fact or condition (even a naked promise), or to believe he has a contract, until it is too late for him to otherwise protect himself, the first one is estopped to assert later such fact or condition or contract does not exist. Defendant is thus estopped to claim Hinkle did not have immediate coverage.
> *Miller* v. *Lawlor*, 245 Iowa 1144, 66 N. W. 2d 267.

It took two judges of the Court of Appeals 10 printed pages (R. pp. 86 to 96), with the aid of a 61 page brief filed by good attorneys, and quotations from A. L. R., and from more than 20 cases cited and quoted, and the benefit of the "weight of authority" to finally determine what this "receipt" meant. How could the law expect an ordinary applicant to understand what the "receipt" means, in one sitting of less than a half hour when they write in ink "immediate coverage," and when the first sentence says the insurance is effective at once, and he knows he is charged premium from the date of the application? Surely an ordinary man is led to believe that he is getting what he is paying for. To refuse to apply estoppel in these contracts, would require a holding that an ordinary man without the aid of a law library who never heard the "weight of authority" is bound to know more than the lawyers and judges.

Under Iowa decisions on "mending his hold" defendant was *not* entitled to have its motion for directed verdict

sustained upon the ground held by the majority opinion because such was not the ground defendant first elected as its reason for refusal to perform its contract. *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N. W. 207.

The reason first elected by defendant for not performing was that Hinkle had not had a physical examination (R. pp. 9, 29, 91). The Court of Appeals held on page 91 of the Record,

> "The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent."

Thus under the above cited case on "mending his hold", there was nothing further to decide, and when the Court of Appeals proceeded after the above quoted holding and discussed the weight of authority, and then five pages later on page 96 of Transcript of Record, held:

> "The evidence conclusively shows * * * that defendant made a good faith determination that he was not so insurable"

and later on the same page said,

> "Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff"

they violated the Erie rule by not following the Iowa decisions on "mending his hold", and in addition to that violation, they based their reversal on a ground for a directed verdict not mentioned in defendant's Motion for Directed Verdict, and in addition to that they based it on a finding of fact that the defeasance clause had been performed, when defendant never even claimed that it had performed such clause, never claimed it had made such determination, but claimed just the opposite, and that the Iowa agent had never sent it to the home office (R. p. 47, 6th line).

We submit, therefore, that by the above quoted parts of the prevailing opinion the Court of Appeals violated the Erie rule in three respects, also ordered a verdict directed on a ground not mentioned in the Court below, and thus violated due process under the 5th Amendment, and based such finding on "conclusive" evidence, when the evidence of defendant claimed just the opposite of what the opinion says the "evidence conclusively shows"; and violated the 7th Amendment.

The majority opinion amends the second clause used by defendant, and re-writes such clause relating to "rating applied for", by striking out the words "rating applied for", and substituting therefor, "premium charged by the company". Unless they can make that change and re-write the contract defendant printed, there is no possible ground to direct a verdict for defendants. We submit the Court of Appeals had no right to so re-write defendant's contract. There is no evidence that "rating applied for" means the "amount of premium charged". Instead of following strictly the wording of the contract the way the insurance company drafted it, as required by Iowa decisions, *Temple* v. *Fraternal Bankers Reserve*, 179 Iowa 65, 161 N. W. 102, the Court re-wrote the proviso to make it more favorable to the company than the company had drafted it themselves.

An applicant does not apply for any rating, whatever "rating" means. See the Application (R. p. 19). There is no place on it for him to apply. If it means the "amount of premium charged", as assumed by the majority opinion, he still does not *apply* for it, they assign it to him. Hinkle was insurable for the amount, plan, and every rating he applied for, because he never applied for any rating regardless of what "rating" means, and they never

intended for him to because they provided no place on the application for it.

The word "rating" does not mean "the amount of premium", in any dictionary you can find. The Iowa decisions do not permit an appellate court to add words to a contract in order to put the trial court in error. Also, applicants do not apply to insurance companies for "ratings", such is the business of mercantile credit agencies.

Neither the court nor jury can substitute their own knowledge (here of what two parties intended) for evidence. *Downing* v. *Farmers Mut. Fire Ins. Co.*, 158 Iowa 1, 138 N. W. 917. A court can not take judicial notice of the meaning of any word unless the dictionary gives only one meaning, and if the dictionary gives more than one meaning, it is a question of fact which of the possible meanings was intended (by Hinkle as well as defendant). It can take judicial notice only of such propositions of generalized knowledge as are so notorious as not to be the subject of reasonable dispute. Rule 801, American Law Institute Model Code of Evidence. Cyclopedic Law Dictionary, Third Edition, Callahan & Co., defines "rating":

> "The estimate put on the credit and financial resources of a person."
>
> "The order or class of a vessel according to her magnitude or force."

We submit the appellate court has no basis for what *it thinks* "rating" means.

We submit the Court of Appeals violated the Erie rule when it went outside of Iowa for its quotations and failed to follow the four Iowa decisions we cite herein, contained in 245 Iowa, Miller, 187 Iowa, Reynolds; 127 Iowa, Farmers Mill. Co.; and 179 Iowa, Temple case, and the trial court was correct and it was error to reverse the

trial court, and the majority opinion was not "by the rules of the common law".

B. The majority opinion's view of the effect of the words "immediate coverage" written in ink by the insurance agent, falls also under the Erie rule, which we have pointed out under Questions Presented. If they had read the Iowa cases we cited (cases page 7 *ante*) they would have found that there is an element of estoppel, which the Iowa court calls apparent authority, that is binding on a Federal court in a diversity case, or that by charging a premium over the interim, they have impliedly promised the man that he has what he is paying for.

From the instructions given the jury by the trial court and from his ruling printed in 147 F. Supp. 547, he held the Iowa law to be that there was insurance from the date of the "receipt" if Hinkle was in good health. He did not specify whether he so found from what is said in the Reynolds case, or what is said in the Nertney case, or because they never performed the defeasance clause. From the Nertney case he could have found that the Iowa law is that if the company is charging premium from the date of the "receipt", *the law imposes, or implies a promise, regardless of the language printed, to insure over the period covered by the premium.* If he based such on either of the above Iowa cases an appellate court could not prove he was wrong as to the Iowa law, because, *Nertney* v. *National Fire Ins. Co.*, 199 Iowa 1359, 203 N. W. 826, contains language indicating the Iowa court would so hold, in case the agent had not expressly promised immediate coverage.

The *Nertney* case, above, was on fire insurance and the agent had in writing promised immediate coverage, and the point of law raised was as to his authority in view of a clause in his agency contract expressly denying him

such authority. The Iowa court, in holding that he did have such authority in spite of his contract, after observing that the policy when issued would be dated the date of the application, said:

> "No one would be expected to take out insurance for a period of time that had elapsed, but, unless there is a valid preliminary contract of insurance covering the time between the making of the application and its acceptance or rejection, that is what every insured who receives such a policy is required to do. The injustice of saying that, on the acceptance of the application, the insured has had protection from the prior date where no loss has occurred, where it is also said that he is not protected if a loss did occur, is plain."

Then the Iowa court went on to hold that the company could not deny that the agent had authority. The reason the court gave, however, would be just as good a reason for saying that the *law imposes insurance* for the interim if the company charges a premium over that period. The issue was only the agent's authority, so it was unnecessary to pass upon whether there was any imposed liability, and the court did say that it was not passing upon an imposed liability, in the following language:

> "We are not to be understood as saying that, in the absence of any agreement for preliminary insurance covering the interim between the making of the application and the acceptance or rejection of it by the company, the mere fact that when, or if, the application is accepted, the policy would cover the risk from that time * * *."

It is a hint to the Iowa bar to claim such next time. Then they held the agent did have authority to promise immediate coverage because it was the custom to charge premium over the interim.

The Iowa opinion does not say that if the agent had not expressly promised interim coverage, that none was implied, but merely intimates that it is not necessary under the facts to go so far as to hold implied or imposed coverage. The reason given and the cases cited, however, as quoted above, is just as sound for imposed, or implied promise of, coverage as it is for "apparent authority." Thus, if the Federal trial court believed that such is what the Iowa Supreme Court would hold if necessary, it is a violation of the Erie rule for the Court of Appeals to hold that he was wrong as to the Iowa law. The whole spirit of all the Iowa cases is that if the company is charging premium over the interim, there is insurance coverage over that period.

While defendants offered evidence (over objection of plaintiff) to the effect that the words in ink "immediate coverage" meant "decreasing term policy", in ruling on a motion for directed verdict the Court of Appeals should not take such evidence as conclusively true, so, if it is possible for "immediate coverage" to mean "immediate coverage" it could not hold that the trial court erred in not directing a verdict, for the trial court held, either: (1) the agent expressly promised "immediate coverage", even though it is not conclusive as to what the term was intended to mean, in which case he had authority to so promise, or (2) it is immaterial whether he promised "immediate coverage" or not, or whether he had authority, because the Iowa law is that there is an implied promise, or an imposed liability, if they are collecting a premium over the interim. If he held either of the above, the Court of Appeals violated the Erie rule if they hold he was wrong.

Now, as to the facts, on the above point of law. On page 20 of the Transcript of Record appears the reverse side of the Application, Exhibit D (Def. Ex. D, R. pp. 36,

40, 20) and there is printed thereon by defendant the following:

> "2. If the premium is paid on the date the Application is signed the policy will usually bear that date, if issued as applied for."

Vice-president Arnold of defendant company testified (R. p. 49),

> "If we had issued a policy in this case we probably would have made the due date of the premium the date of the application." * * * If it had been made on this Monday (medical examination) following the application and had gone through, the due date of the premium would have been the date of the application."

It goes without saying that the "receipt" shows that Hinkle did pay the first premium on the date of the Application.

Thus under the Iowa decisions there is either an imposed liability, or the agent has "apparent authority" to promise immediate coverage, and to hold that it was error for the trial court not to direct a verdict for defendant in view of the above evidence, violates the Erie rule even if the agent had not expressly written in "immediate coverage"; and to assume *conclusively* that immediate coverage means something else, or does not add to the printed promises is not due process of law.

C. The trial court in a colloquy with defendant's attorney made some remarks in the absence of the jury which the Court of Appeals holds was error (R. p. 92). We have adequately presented that in our Questions Presented on page 8, *ante*. The majority opinion violates the Erie rule on this also in using "weight of authority". The Trial Court sat as an Iowa Court and there are no decisions of a higher Iowa court.

II.

**The Majority Opinion Is in Conflict with Opinions in the Sixth and Second Circuits, and the Federal Cases Cited, Ante.**

In the case that came up from Tennessee in the Sixth, the insuring clause at one place said the insurance was not effective until a policy was issued, but at another it could have been construed to lead the applicant to believe it was effective at once. In the receipt at bar there was no mention that it was not effective until a policy was issued, but the insuring clause states it is, "effective as of this date," etc. Charging a premium during the interim would lead Hinkle to believe he was getting what he paid for. If Hinkle believed he was in good health, he had a right to believe he had immediate insurance, whereas in the Tennessee contract the insured had some notice that maybe he did not have insurance until he got a policy. But the Sixth Circuit held that even with this notice, the insurance company was liable unless they notified him before his death that he was not insurable. That means that if he went to his death believing he had insurance, they are estopped to claim otherwise after it is too late for him to protect himself. They held the insurance company to a strict compliance with the contract the way they printed it.

The Iowa cases on estoppel are the same or stronger than those of Tennessee, although there are no Iowa cases on all fours with this receipt that mention estoppel. But the general law of estoppel is, if you cause a man to believe or rely on any fact until it is too late for him to protect himself, you are estopped from claiming that such fact does not exist. An extreme example of how far Iowa uses estoppel in its decisions is *Miller* v. *Lawlor*, 245 Iowa

1144, 66 N. W. 2d 267, decided in 1954. The dissenting opinion, as well as plaintiff's pleadings shown from pages 23 to 28 of the printed Record, called attention to estoppel; but the majority opinion refused to apply that part of the Iowa decision, as the Sixth Circuit did.

It is no answer to the above that the Reynolds case did not mention estoppel. No estoppel was claimed there. Plaintiffs herein pleaded estopped in one form or another from pages 21 to 28, Transcript of Record, and on page 24 thereof plaintiffs pleaded:

> "* * * and they printed on said receipt that the insurance was then in force, 'irrespective of any subsequent casualty', they thus lead Max Hinkle into the belief that he was covered by insurance and they caused him to continue under such belief and lured him into a sense of security until his death and until it was too late for him to protect himself." (R. p. 24).

The dissenting opinion herein held the same as the Sixth Circuit. We submit that the majority opinion has refused to follow the Iowa decisions on estoppel.

We further submit that under present conditions, unless the situation throughout the United States is corrected by certiorari herein, whether one can recover on these interim contracts depends upon which Circuit the appeal falls in, pointed out in our statement of the Questions Presented on pages 10 and 11 *ante*.

The Federal rule should be as stated on pages 10 and 11 herein *ante*.

The Federal rule should also be that Courts of Appeals can not re-write the contracts more favorable to the companies, or give them a technical interpretation which only an insurance lawyer would arrive at, but the Federal rule should be as stated by Judge Hand in 160 F. 2d at page 601,

> "an underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. It is the understanding of such persons that counts."

But the Eight Circuit herein read the words, "rating applied for" like *they imagined* an underwriter would understand it, without even any *evidence* of what an underwriter would think, or else they re-wrote it to make it read what the insurance company now wishes it had written, instead of what it did write. To define a word differently than any dictionary defines it, is not due process. See our page 24 *ante*.

III.

**Violates Plaintiffs' Rights under 5th and 7th Amendments.**

The appellate court held the trial court was in error (Opinion, p. A17) for not sustaining defendant's motion for a directed verdict on a ground that was not mentioned in the motion, not assigned as error on appeal, and the opposite fact was claimed and proved by defendant's evidence, namely that defendant had determined Hinkle was not insurable. The error assigned was, the court erred in not sustaining motion for directed verdict on four stated reasons. Their motion never claimed they had determined he was not insurable, as required by the last proviso of the contract; their pleadings never claimed it, and their evidence refuted it (R. p. 48). Their only serious defense was that it was only an offer until they accepted it, and that their committee had never passed on it, and thus no acceptance. In a law action, when the appeals court goes beyond the errors assigned and reverses a trial court

on a matter that was never raised or claimed, such is not due process of law. The constitutional question was raised in petition for rehearing, and denied.

Thus on page 18 (R. 96) the majority opinion states that the evidence conclusively shows defendant made a good faith determination that because of his aviation record Hinkle was not insurable for the rating, etc., applied for, and on page 18 (R. p. 96) says the delay in the "investigation was not prejudicial to plaintiff", in the face of defendant's own evidence and pleading that the "receipt" was not a contract because never accepted, and the company had never received it at its home office (R. p. 47): The Iowa decisions cited herein hold such does constitute prejudice to any plaintiff, that commencing suit based on one excuse for non-performance and thus jeopardy of costs, is such prejudice to plaintiff as to preclude determination by a defendant of a different excuse after suit is commenced. Prejudice, however, is not necessary because making a good faith determination in the regular channels was the only way defendant could escape the terms they had themselves dictated. The quoted part of the opinion above violates the Iowa law as announced in *Reynolds, supra,* and other Iowa cases, *supra,* and in addition passes on a ground for directed verdict not mentioned in the Motion for Directed Verdict. The Motion, Paragraph 9, makes no claim of determining insurability, but only that "he was not insurable under defendant's underwriting rules". To go outside the grounds stated in the motion and hold a trial court erred in not sustaining the motion on some ground not mentioned therein, is not due process of law. A trial court does not err, if none of the grounds stated in the motion are grounds to sustain it, when he overrules it. And it is not due process of law for the appellate court to try a different law suit than the one presented.

The nearest the motion got to the ground of reversal is paragraph 3 thereof, which says "this provision requires a determination by the company of insurability, and negatives a construction of the receipt as being a contract of temporary insurance". The court had on page 11 (R. p. 87) mentioned the Reynolds case, and had held that under that case the receipt *was* a contract, and was not ambiguous. So all paragraph 3 amounted to, was a contention that there was no contract or that it was ambiguous.

There was nothing in the motion to justify the last quoted part of the opinion, and if the court had in mind paragraph 3 of the motion, the Reynolds case in Iowa had determined that point against defendant. Thus either the court abandoned the rule in the Iowa cases, or it sustained the Motion on some ground not stated therein. If it is the first, it violated the Erie Rule, if it is the second, it is not due process of law. Also on page 14 (R. pp. 92-94) the opinion states the trial court erred because it took the position good health and insurability were synonymous, in a colloquy with defendant's attorney. The only error assigned was he should have directed a verdict for four named reasons and this colloquy was not assigned as one of them. It is not due process for the appellate court to pass on errors not assigned and which were not raised by the motion that the trial court overruled, and that had no bearing upon the outcome of the law suit.

The trial court admitted in evidence over plaintiffs' objection the application defendant produced. It was still primarily blank, although Hinkle's signature appeared upon it. No copy had been delivered to Hinkle, and the Iowa Code, § 511.34, prohibits the use for any purpose of such an application by an insurance company. The purpose was to prove Hinkle misrepresented his airplane and pilot's activities. By the Iowa case cited above, such is immaterial

unless the company *determines* that the applicant is for such reason not insurable before it gives some other reason for not performing the contract, so the trial court later treated it as immaterial. Plaintiff proved, however, by two witnesses who were in the room at the time the application was taken by Bliss, circumstances which would at least leave a jury question that Bliss wrote those false answers into the application after he learned that Hinkle had been killed. The opinion holds Bliss's testimony is conclusively true. This denies plaintiff a jury trial on an issue of fact. The circumstances so completely refuted Bliss's testimony as to make it unreasonable.

Passing on matters as stated above not claimed in the pleadings or in the errors assigned, and holding defendant's evidence, if any, "conclusively" true in a law action on appeal, is not due process, and is not "by the rules of the common law", and denies a jury trial.

Further, it is not due process for an appellate court to re-write the clause containing the words, "rating applied for" or read it as if it said "premium charged by the company", or to take judicial notice that the word "rating" means the same to the ordinary man that it does to an insurance lawyer, especially in the absence of any evidence of what it means in the insurance world, or to take judicial notice that it means something other than the definition given in the dictionary. Judicial notice can be taken only of recitals in dictionaries and encyclopediae when the recital is uniform everywhere, and not open to differences of opinion but never take judicial notice of some definition *different* than that given in the dictionary. As pointed out on page 33 *ante,* the dictionary does not define "rating" the way the Court of Appeals does. Such imaginary definitions are not due process.

The opinion refused to pass on two matters argued with the inference in each that the trial court erred as to them: (1) As to whether appellant could raise for the first time after trial a question as to sufficiency of evidence that Hinkle was in good health. The court instructed the jury that there was sufficient evidence of good health. No objection was made to the instruction. Defendant's motion for directed verdict did not mention insufficiency of health evidence as a ground. Defendant's answer did not put the question of health in issue, and it did not deny plaintiff's allegation of good health, but stated merely that defendant had no knowledge of such fact. Rule 9 requires a defendant in denying a condition to have such knowledge and to plead it specifically and "with particularity". To infer the trial court erred on a matter not in issue is not due process.

(2) The opinion infers that if it were necessary the appellate court would hold that defendant could use as a defense the fact that it deliberately violated an Iowa statute, and that issuing this contract in Iowa might be a violation, although there are no Iowa cases so holding. The Iowa law is plain that one can not claim the benefit of his own wrong, if there were any wrong. The trial court determined that and no objection was made to his instructions.

We mention all of the above because it shows the attitude of the two writers of the majority opinion, which together with their refusal to let the rehearing petition go before the full bench, shows on its face that plaintiff was deprived of her judgment without due process, and that the majority procedure was not by the rules of the common law, as required by the 7th Amendment.

## IV.

### No Federal Jurisdiction in Foreign Corporation Removal Cases.

Any act of Congress allowing removal by a corporation of any case because it could have been *commenced* by the plaintiff in a Federal court is void as an attempt to expand the Judicial Power of the United States beyond that fixed by the Constitution.

Ever since 1844 there has existed a platitude that a foreign corporation could remove a case against a citizen of the state who elected to commence it in a state court. This platitude is based on an erroneous application of what was held in *Louisville C. & R. Co.* v. *Letson*, 2 How. 497. The reason the court gave therein as later interpreted in *Marshall* v. *B. & O. R. R. Co.*, 16 How. 314, 14 L. Ed. 953 (1853), precludes *removal* by a corporation, rather than sustains removal. A natural person in each, Marshall and Letson had sued a foreign corporation in a Federal court, and the corporation tried to defeat that right of the plaintiff to choose a Federal court. The Marshall case says right to choose his forum is "a privilege and immunity of a citizen of the United States," and held again, 1853, that although it was not a citizen of any state, and thus no diversity, a corporation could not plead its artificiality or lack of citizenship to defeat the right of a natural citizen to elect his tribunal. To do so would give a non-citizen an advantage over a citizen. There had been the fiction, resurrected again in *Muller* v. *Dows*, 94 U. S. 444, 445 (1876) (because it held a corporation was not a citizen), that all its stockholders were citizens of the state of its incorporation—a type of estoppel. To apply that same fiction to the opposite situation where the plaintiff had elected the *state* court as her tribunal and to permit the corporation

to remove the case to a court of *its* chosing, violates the very thing the court was trying to prevent; it enables the corporation to take advantage of its artificiality and non-citizenship to defeat the rights of the natural person to elect to use the *state* courts. We find no decisions since 1853 passing upon the point we raise here, removals by a corporation. Since that time however, it has been decided that a conclusive presumption is not due process; *McFarland* v. *Am. Sug. Ref. Co.*, 241 U. S. 79; fictions have been said to be "an unconstitutional assumption which no lapse of time should make us hesitate to correct"; 139 F. 2d 1003; the reasoning is "examples of Marshall's time that are not sound under modern conditions", 337 U. S. 618; and is analyzed and refuted in 56 Harvard L. R. 853, 873, 885.

The quotations and reasons stated in the opinion in *Mashall* v. *B. & O. Ry.*, in 1853 show that this court intended in both Letson and Marshall to hold that a corporation was not a citizen, and that this platitude relied on by defendant has no basis in the decisions of this court, and that there is no Federal jurisdiction for *removal* by a foreign corporation; the rule from those cases of this court is merely, a corporation can not take advantage of its artificiality to defeat the right of a citizen to elect to use the Federal court.

It would be a travesty on justice if this little woman would have to pay all this printing bill, unnecessarily large because appellant and the majority opinion wish to discuss the "weight of authority", and then get no result for these terrific costs, because defendant has tried to wear her out in a court that has no removal jurisdiction, so we do not push this too much, but we do not wish to defeat the right of the Federal government to protect itself from needless work on cases over which it has no jurisdiction, nor to protect other widows and orphans from being defeated of their rights to have their litigation decided in the state

courts where they will have to print arguments on state law only.

At the outset of the Record we signed a stipulation prepared by opposing counsel that there was Federal jurisdiction to make unnecessary printing the record of this remand motion. We do not wish to violate that agreement; but we do not wish to preclude the court from protecting itself, nor do we wish to do what Congress has no power to do, and confer jurisdiction beyond that fixed by the Constitution.

If we are wrong about the Iowa decisions pointed out herein, then the case should be remanded with direction to sustain the motion to remand to the state court, at *defendant's costs* for causing all this Federal printing; but if we are right as to the Iowa decisions, we trust the court will find a way to give us the fruits of our labors, and order the Court of Appeals to affirm the judgment of the District Court. If there is Federal jurisdiction, uniformity requires that all Circuits follow the Sixth, and be required to apply the ordinary law of estoppel of the state involved, as advocated by the dissenting opinion herein. If it was not removable, Federal common law requires defendant to pay the judgment as stated on page 21, *ante*.

We submit, that under the Iowa decisions cited herein, the trial court got the right result under the Iowa decisions, the Court of Appeals reversed on an error not raised and not in conformity with Iowa decisions, and in conflict with 6th and 2nd Circuits, denied plaintiff's right to a jury trial, violated procedural due process of law, and this Court should order the Court of Appeals to affirm the judgment of the District Court, and apply our proposition stated on page 21.

Respectfully submitted,

LELAND S. FORREST,

*Attorney for Petitioners.*

## APPENDIX.

The following is copied from Code of Iowa, 1954:

"511.33. *Application for insurance—duty to attach to policy.* All life insurance companies or associations organized or doing business in this state under the provisions of the preceding chapters shall, upon the issue of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy, or, upon reinstatement of a lapsed policy, shall attach to the renewal receipt a true copy of all representations made by the assured upon which the renewal or reinstatement is made.

"511.34. *Failure to attach — defenses — estoppel.* The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of section 511.33, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."